

QUT Digital Repository:
<http://eprints.qut.edu.au/>



Kift, Sally M. (2007) Cyberbullying by young people: A criminal matter for psychologists? . In *Proceedings Psychology making an impact: the Australian Psychological Society 42nd Annual Conference*, pages pp. 228-232, Brisbane, Qld.

© Copyright 2007 Australian Psychological Society

Cyberbullying by young people: A criminal matter for psychologists?

Sally Kift (s.kift@qut.edu.au)

Faculty of Law

Queensland University of Technology, Brisbane QLD 4001 Australia

Abstract

Cyber bullying, as a misuse of technology to harass, intimidate, tease, threaten, abuse or otherwise terrorise will be discussed in terms of its criminal legal ramifications in Australia for young people. In extreme instances, cyber bullying can constitute criminal conduct on the part of the perpetrator, especially when the behaviour is seriously threatening, harassing or intimidating. Whilst criminal sanctions might seem an extreme response, it is not inappropriate for all stakeholders – young persons, parents, schools, education authorities and psychologists – to be aware of the potential for criminal liability, especially when the consequences of the cyber bullying conduct are serious for the target and/or where there is simply no other basis on which the conduct might be impeached, occurring as it frequently does beyond temporal and physical school boundaries. This paper considers prevention and intervention strategies for cyber bullying from a criminal legal point of view.

Cyberbullying and the Criminal Law

It is not new to observe that young people today spend large amounts of time in seemingly ubiquitous online interactions integrally connected to their patterns of social engagement. The Net Generation (those born from 1982 onwards) is always on, always connected and prolific in its electronic socialising and interactive communications (Oblinger & Oblinger, 2005). A recent 2005 Canadian report, *Young Canadians in a Wired World* (Media Awareness Network, 2005) found for example that 94% of young people accessed the Internet from home, with students as young as Grade 4 becoming reliant on the Internet to stay in contact with friends. It is clear that Net Geners explore social connectedness through technology as a seamless extension of their daily lives.

However, it is equally clear that the technological affordances so readily embraced by young people have proven fraught with the potential for cyber harm – an issue of increasing concern to schools, parents and health care professionals alike. While the risks of predatory online behaviour by adults towards young people are highly publicised and widely understood, less well known and only now being researched is youth-to-youth or youth-to-teacher online harassment. In a recent U.S. 2005-6 survey of online student behaviours and attitudes, the i-SAFE National

Assessment Centre (n.d.) found that, as amongst 13,000 students from Grades 5-12:

- 22% of students knew someone who had been bullied online
- 19% of students admitted to saying something hurtful to others online
- 12% of students have personally become upset by strangers online.

This accords with other recent studies which place the incidence of cyber bullying overall at about 20% (MSN, 2006; Smith, Mahdavi, Carvalho, & Tippett, 2005).

In many instances, cyber bullying can constitute criminal conduct, especially when the behaviour is seriously threatening, harassing or intimidating. While there may be a natural tendency to seek to avoid the criminalisation of young people in this context, criminal sanctions are apposite to more cases than are generally appreciated, while very few young people seem to appreciate their potential for attracting criminal liability. Media reports and other accounts, however, have recently highlighted that schools themselves, if not teachers and parents also, are increasingly inclined to resort to the criminal law; often out of fear, frustration or in the interests of community safety. For example in the U.S., Meadows et al (2005) reported that six Grade 8 children were charged with harassment, while four were also charged with making terrorist threats. The children had "derided classmates about their weight and threatened students online, telling one, 'You'll be needing an intraocular lens when I stab a skewer through your head.'" They were found guilty and sentenced to community service and probation.

While the criminal law might appear at first instance to be a blunt instrument, it is not inappropriate for all stakeholders – young persons, parents, education authorities, schools, and psychologists – to be aware of the potential for criminal liability, especially when the consequences of the cyber bullying conduct are serious for the target or when there is simply no other basis on which the conduct might be impugned, occurring as it frequently does beyond temporal and physical school boundaries. The latter, in particular, is where an understanding of the potential reach of the criminal law can be quite a powerful deterrent: it is frequently difficult, if not impossible, for schools to manage the ramifications of cyber bullying when it occurs outside school time and gates, even though it affects in-school

relationships and impacts negatively on the school learning environment.

This paper will first discuss the circumstances in which the school-aged cyber bully can be held criminally responsible for their conduct and will then turn to examine several of the more fertile grounds for criminal liability. These considerations raise important issues for many professionals and carers who have responsibilities to educate young people pro-actively around appropriate and safe online interactions (both perpetrators and targets alike) and who need to be alert to the need to protect against and manage for the very real potential of physical and psychological harm arising from the impact of cyber bullying. As U.K. Schools Minister Knight stated in 2006 (Sherrif, 2006):

"No child should suffer the misery of bullying, online or offline, and we will support schools in tackling it in cyberspace with the same vigilance as in the playground. Every school should account for cyberbullying in their compulsory anti-bullying policies, and should take firm action where it occurs."

Criminal Responsibility of the Adolescent Cyberbully

It is a fundamental proposition of the criminal law that a perpetrator must commit the proscribed conduct concomitant with having the requisite guilty mind or intent. The latter focus on guilty intent is commonly referred to as "criminal responsibility". A person may avoid criminally responsibility by reason of their "immature age". While young offenders might generically suffer from a degree of immaturity in the sense of underdeveloped empathy skills, lack of appreciation of the gravity of their conduct, and reduced ability to control their impulses, the criminal law is generally not concerned with those aspects of (im)maturity but, rather, focuses strictly on an age threshold to impose liability.

At common law, the age of criminal responsibility is 7 years. This has been raised by statute in all Australian jurisdictions to 10 years, meaning a cyber bully under 10 will never be liable, while those aged between 10 and 14 years may be criminally responsible if the prosecution can prove beyond reasonable doubt that the child knew they ought not to have committed the offence; that is, they knew that it was a wrong act of some seriousness, as distinct from an act of mere "naughtiness or childish mischief".¹ Children aged 14 and over are deemed to have the requisite capacity.

In practice today, most children aged 10-13 are found criminally responsible and the question of criminal responsibility as an impediment to prosecution will rarely arise.

Potential criminal liability

In Australia, with the exception of Division 8B *Crimes Act 1900* (N.S.W.) (discussed below), there has been no dedicated legislative response to cyber bullying, unlike the situation in the U.S. (Hartmeister & Fix-Turkowski, 2005). Despite the absence of targeted responses, the conduct involved in cyber bullying is no more or less than a further manifestation of personal violence or harassment that causes psychological and/or physical harm, albeit in the context where the offline world of violence (or threats of such to person or property) has moved online and into cyber space. Many of the crimes that may be committed correlate with the civil remedies available (e.g., assault, defamation, harassment), though obviously the criminal standard of legal proof is higher (beyond reasonable doubt) than for civil actions (the balance of probabilities). The definitional essence of bullying conduct (Salmivalli, 2001) – the power imbalance, the intentional and repetitive nature of the harassment, victim blame and exclusion as justifications, the implicit support of the bully by bystanders and that victims are unable to defend themselves – lends itself easily to a criminal analysis.

While the criminal law, like the civil law, is still playing catch up in the area of criminal cyber activity, it does not require any great stretch of the prosecutorial imagination to reconceptualise types of cyber bullying as the well known criminal offences of assault, threats, extortion, stalking, harassment, indecent conduct and the like, while an increasing array of new offences, such as torture, voyeurism, cyberstalking, and the telecommunications offences, expand the reach of the criminal law to capture young and older offenders alike. Various of these offences will now be examined. The legal framework presented will then be utilised to distill potentially useful psychosocial interventions.

Threats

Misuse of telecommunications services Under the *Criminal Code Act 1995* (CTH), offences have been enacted proscribing the misuse of telecommunication services to menace, threaten or hoax other persons. Essentially these provisions target harmful online speech and are a potent weapon against electronic harassment when the bully targets either students or teachers for intimidation. For example, s 474.16 *Criminal Code Act 1995* (CTH) makes it an offence for a person to send a hoax communication intending to induce a false belief that an explosive has been left somewhere. It is salutary to remember that one of the boys involved in the infamous U.S. Columbine High School shootings had set up a website on which he made threats and discussed violent activities.

Under s 474.15, it is an offence for a person to use telecommunication services, including the Internet, to

¹ *C v DPP* [1996] 1 AC 1.

threaten to kill or to cause serious harm to another person (e.g., the target) or to a third person, if the bully intends the target to fear that the threat will be carried out. "Fear" is defined broadly in the section to include apprehension, while "threat" is defined as including "a threat made by any conduct, whether express or implied and whether conditional or unconditional". It is not necessary that the target actually fear that the threat will be carried out. It may be observed that most bullies intend that their targets are fearful, and there have been hundreds of reported instances of death threats and threats of serious harm being made in the cyber bullying context (most commonly by email or text) (MSN, 2006).

Similarly, s 474.17 makes it an offence to use telecommunication services to menace, harass or cause offence. It is irrelevant whether this effect is caused by the method used (for example, multiple postings on a website) or the content of the communication or both, so long as reasonable persons would regard it as being menacing, harassing or offensive in the circumstances.

In October 2006, schools in N.S.W. were advised by that state's Education Department that making threats against teachers and students on internet blog sites, or by other inappropriate use of the Internet, telephones or text messages, is a criminal offence (Patty, 2006). It was reported that a N.S.W. Year 9 student had been suspended for two days for posting inappropriate comments about teachers on an internet site. The *Sydney Morning Herald* (Patty, 2006) quoted a Sydney high school memo that was said to have been sent to parents requesting that they monitor students' access to the internet and warned that "cyber bullying is illegal". The memo also warned that:

"One such blog at livejournal.com has entries from some of our students which have defamed the school and defamed and threatened staff...Some students have been suspended from school for intimidation and cyber bullying."

Similarly in 2005, the *Boston Globe* reported that the Boston Public Schools had banned their students from using Yahoo, Hotmail, or other personal web-based accounts from school (Tracy, 2005). That action was taken after four incidents in four months of students using school computers to bully other students and teachers by e-mailing threats, hit lists and pornography.

Other Threats Mirroring the Commonwealth threats provision, every Australian state and territory has their own threat offences, all clearly applicable to cyber bullying instances where the conduct might not result in physical injury but a target is put in fear of personal violence against them. The most obvious and serious threat that can be made is the threat to kill or to cause serious harm: for example, *Crimes Act 1900 (N.S.W.)* s 31 makes it an offence maliciously to send or deliver, or

cause to be received, any document threatening to kill or inflict bodily harm. Less serious threat offences are also provided for in all Australian jurisdictions, variously proscribing a cyber bully from threatening to harm, injure or endanger a target to varying levels of gravity.

An example of a successful criminal prosecution for uttering threats to cause death or serious bodily harm (essentially – "I am going to beat you up" and "You're dead") was the British Columbian case of *R v D.W. and K.P.D.* [2002] BCPC 0096 and *R v D.H.* [2002] BCPC 0464, where the harassment ultimately caused the accused's target, a Grade 9 classmate, Dawn Marie Wesley, to commit suicide. In *R v D.W. and K.P.D.*, Rounthwaite CJ held that "bodily harm" includes "psychological hurt or injury, as well as physical" (at [13]) and found that conditional or future threats are included in the ambit of the offence.

Stalking

The stalking, intimidation and harassment offences that have proliferated nationally and internationally over the past decade provide further fertile ground for the imposition of criminal liability for cyber bullying. Stalking has been described as the "pursuit by one person of what appears to be a campaign of harassment or molestation of another" (Wells, 1997). The necessity for anti-stalking legislation has been well documented in a myriad of contexts – such as celebrity stalking, personal and workplace relationship stalking, or random, stranger stalking – and its prosecution often targets conduct that would otherwise be beyond the reach of the criminal law (Kift, 1999). Common examples include: following, loitering, watching or keeping the target under [electronic] surveillance; repeated contact by phone, email or text; interfering with property; leaving offensive material where it might be found; or confronting another [in cyber space]. Of particular relevance to cyber bullying is that these offences have proven extremely valuable as part of a larger strategy to contain domestic violence and like behaviours (such as bullying) where an imbalance of power is exploited in quite unimaginable and bizarre, but extremely frightening, ways.

The efficacy of stalking in the cyber bullying context is twofold. First, the gamut of behaviour the stalking offences capture is rarely found to be wanting: the proscribed conduct need not be criminal in itself (for example, a threat may be merely underlying or implicit, rather than overt) and the net of liability cast is exceptionally wide. Secondly, though jurisdictional variations exist as to the bully's requisite intent and the required state of mind (if any) of the target, it is usually sufficient that the bully, by their repeated conduct, intends to induce in the target an apprehension or fear of violence or harm (which in most Australian states

includes *either* physical *or* mental harm). As the very essence of cyber bullying is frequently the desire to cause emotional, rather than physical, harm and distress, in the cyber stalking context the absence of an actual physical threat is no impediment to prosecution.

All Australian jurisdictions have stalking legislation proscribing behaviour calculated to harass, threaten or intimidate. While each statutory response is subtly different, many contain lengthy, inclusive lists of the types of conduct caught, while all the Australian statutes, with the exception of WA, have made specific provision for cyber stalking, though to varying levels of sophistication.

The application of these provisions to instances where cyber bullies post cruel messages, insults, threats or polls online, upload nasty images, or manipulate another student's online content is very readily apparent and, if done on more than one occasion with the requisite intent, will easily constitute the stalking, intimidation or harassment offence.

Assaults by threat of force and causing bodily harm (and the like).

Assault by threat of force Of particular relevance to cyber bullying is that a criminal assault may be committed by the *threat* of force – by putting the target in fear of imminent violence – and without the necessity that any actual direct or indirect force is applied.

This offence of common assault exists in all states and territories. The elements of the offence vary between jurisdictions but, with one serious exception noted below regarding words or images alone, will usually lend themselves readily to the cyber bullying context. Generally it is required that

- the bully attempt or threaten to apply force,
- the threat must be evidenced in some way (though in Tasmania, Qld and W.A. mere words or images online are *insufficient* evidence), and
- the threat creates an apprehension in the target of present or immediate harm by reason of the bully's apparent ability to carrying out the threat.

Bodily harm (and the like) Other possible criminal sanctions under this head include that the offender has caused some other form of criminal harm. The major issue for the imposition of this liability is whether the harm, however it is described – grievous, bodily, actual bodily, serious – includes psychological harm. Uncertainty surrounding this issue was a key driver for enacting the stalking legislation, described above. The English common law has developed in this area and could yet prove influential for future interpretations of Australian provisions. In 1998, the English House of Lords held that “bodily harm” could include mental harm or psychiatric injury provided the latter amounted to a “recognisable psychiatric illness”, which in that

case included clinical anxiety and depression.² In so holding, their Lordships were much influenced by the nervous shock cases in the law of negligence and held (at 159) that the term “bodily harm”, as used in the *Offences Against the Person Act 1861* (U.K.), “must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury”. Australian provisions proscribing the occasioning of bodily harm (and the like) could well import a similar interpretation, which would allow for cyber liability where the bullying conduct caused a recognisable psychiatric injury.

Crimes Act 1900 (N.S.W.) Division 8B: Assaults etc at schools The Crimes Act 1900 (N.S.W.) was amended by the *Crimes Amendment (School Protection) Act 2002* (N.S.W.) to make specific criminal provision in s 60E for assault, stalking, harassment or intimidation of any school staff or student while attending the school. This section is unique in the Australian criminal law, but is confined in its reach to staff and students while “attending the school” (as defined s 60D(2)). As such, s 60E will be of limited application in the cyber bullying context and apply only when the conduct actually occurs on the school premises or while entering or leaving school premises for the purposes of school activities.

Miscellaneous other criminal offences

There are various other potential bases for criminal liability, including liability as a “party” to an offence (for example, by aiding, counselling or procuring), for an attempt to commit an offence and for specific other individual offences such as torture. Also pertinent has been the recent criminalisation of non-consensual visual recording of a target when the latter is engaged in a private act or in a private place (such as showering or toileting at school) and the distribution of those recordings (for example, by posting on a blog).

A Basis for Responses and Interventions

All stakeholders have a duty both to understand the frequency, nature and reach of cyber bullying among young people and the extreme seriousness of its potential consequences. The challenge, of course, is to educate school communities and young people around the qualitative difference between annoying or impolite interactions on the one hand and dangerous and offensive cyber bullying conduct on the other.

The position taken by the criminal law is salutary on these matters and, it is suggested, should prove helpful to school authorities, psychologists and parents in their

² *R v Ireland; R v Burstow* [1998] AC147 at 159; see also *R v Chan-Fook* [1994] 2 All ER 552 at 559.

understanding and assessment of the gravity of any impugned conduct. The factors on which the criminal law focuses – the kind of threats, their nature and frequency, the potential involvement of third parties, the escalation in magnitude, menace and intimidation, the physical and psychological effect on the target, and the intention of the bully in perpetrating the behaviour – are all useful indicia to which school authorities and psychologists may have regard when conducting cyber bullying assessments, for example, in the interview and information gathering phase. The evidence trail often left in the wake of the misuse of technology, which can be gathered, saved, and used in subsequent proceedings and disciplinary actions, is also a potent tool in the deterrence armoury.

The notion of “reintegrative shaming” of lawbreakers as a mechanism for crime control – whereby the existence of criminal sanctions can be harnessed to support a culture of judicious shaming coupled with restorative justice principles that then seek to reintegrate the bully/offender into the community by having them acknowledge the shame of the wrongdoing and offering ways to expiate that shame – could be usefully adapted in this context (Braithwaite, 1999). A policy and program commitment to such a process sends an unequivocal message to bullies that their significant others (peers, parents, teachers, and counselors), as one with the general community, deem cyber bullying to be inappropriate by any standard (especially to the more serious criminal standard) and reinforces that such behaviour will not be condoned or tolerated.

An approach of this type may provide an entrée into other systematic, therapeutic responses. If underpinned and supported by a robust and integrated policy environment, a range of psychosocial interventions might be usefully embraced: for example, including –

- dedicated skill building programs around core values, anger management, enhanced empathic awareness, peer intervention skills, problem solving skills, and self-esteem enhancement;
- police/legal briefings and training for students, staff and the broader school community;
- staff development opportunities for school staff;
- educational responses to empower targets and bystanders alike about how to prevent, protect and respond appropriately to cyber bullying; and to alert would-be bullies to the serious potential consequences both they and their targets face as a result of their anti-social conduct.

Conclusion

When cyber bullying by young people causes serious physical and/or psychological harm, the gravity of its construction as criminal conduct, in addition to acting

as a potent deterrent, has implications for many professionals. It is our responsibility to work together more constructively to ensure that immature youths, who may be held criminally accountable for their anti-social conduct, are educated about cyber bullying as unacceptable harassment and are protected from it.

References

- Braithwaite, J. (1989). *Crime, Shame and Reintegration*. New York, NY: Cambridge University Press.
- Hartmeister, F. & Fix-Turkowski, V. (2005). Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs. 195 *Education Law Report*. 1, 5-6.
- i-SAFE National Assessment Centre. (n.d.). iSAFE Statistics. Retrieved May 24, 2007, from http://www.isafe.org/imgs/pdf/mediakit/iSAFE_Stats.pdf
- Kift, S. (1999). Stalking in Queensland: From the Nineties to Y2K. *Bond Law Review*, 11(1), 144.
- Meadows, B., Bergal, J., Helling, S., Odell, J., Piligian, E., Howard, C., et al. (2005) THE WEB: The Bully's New Playground." *People*, 63(10), 152-156. Retrieved January 8, 2006, from <http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=16331661&site=ehost-live>
- Media Awareness Network. (2005). *Young Canadians in a Wired World* Phase. Retrieved September 24, 2006, from <http://www.media-awareness.ca/english/research/YCWW/PhaseII/>
- MSN. (2006). *MSN Cyberbullying Report: Blogging, instant messaging and email bullying amongst today's teens*. Retrieved January 5, 2007, from http://www.msn.co.uk/img/specials/portal/cyberbullying/cyberbullying_tall_revised3.pdf
- Oblinger, D., & Oblinger, J. (2005). Is it age or IT: First steps towards understanding the Net Generation. In D. Oblinger & J. Oblinger (Eds.), *Educating the net generation*. EDUCAUSE. Retrieved September 24, 2006, from <http://educause.edu/educatingthenetgen/>
- Salmivalli, C. (2001). Group view on victimization: empirical findings and their implications. In J. Juvonen & S. Graham (Eds.), *Peer Harassment in school: The plight of the vulnerable and victimized*. New York: Guilford Press.
- Sheriff, L. (2006, July 25). UK declares war on cyberbullies. *The Register*. Retrieved June 16, 2006, from http://www.theregister.co.uk/2006/07/25/cyber_bullying/
- Tracy, J. (2005, May 28). Schools prohibit personal e-mail sites. *Boston Globe*. Retrieved May 24, 2007, from http://www.boston.com/news/education/k_12/articles/2005/05/28/schools_prohibit_personal_e_mail_sites/
- Wells, C. (1997). Stalking: The Criminal Law Response. *Criminal Law Review*, 463-470.